APPENDIX A—ORDER OF THE ELEVENTH CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8197

IN RE: MURRAY NEWMAN AND CAPITOL MOTORS, INC.,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Georgia

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U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 21 1982
NORMAN E. ZOLLER
CLERK

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is denied.

APPENDIX B—ORDER OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE PETITION OF MURRAY M. SILVER FOR AN ORDER QUASHING A CERTAIN SUBPOENA DUCES TECUM PURPORTEDLY SERVED UPON TRUST COMPANY BANK, ATLANTA, GEORGIA AND RESTRAINING AND ENJOINING SAID TRUST COMPANY BANK OF ATLANTA FROM COMPLYING WITH OR OTHERWISE OBEYING SAID SUBPOENA DUCES TECUM

CIVIL ACTION NO. C82-509A

FILED CLERK'S OFFICE
BEN H. CANSAR, Clerk
By: s/ David Yuris
Deputy Clerk
3/16/82

ORDER

Petitioner in this matter is a defendant in an action currently pending before the United States District Court for the Southern District of New York entitled *Murray Newman and Capitol Motors, Inc. v. Murray M. Silver and Murray M. Silver, P.C.*, Docket Number 80 Civ. 1775 (RWS). The trial in the New York action commenced on January 13, 1982 and is still in progress. It appears from the statements of counsel that the trial in New York is scheduled to resume on Wednesday, March 17, 1982 with

the direct examination of petitioner Murray Silver. As also appears from the briefs and argument of counsel, the respondents, plaintiffs in the New York action, were informed by Mr. Silver sometime after the commencement of the trial in New York that he could not locate certain bank records that respondents desired produced. The respondents requested the trial judge in New York to order Mr. Silver to sign a release authorizing the Trust Company Bank, located here in Atlanta, to produce the missing records for the respondents. The trial judge refused to issue such an order.

Respondents then retained local counsel for the purpose of having a subpoena duces tecum issued in this district where the bank is located. A blank trial subpoena was obtained from the clerk of this court, which subpoena was completed and served upon the Trust Company Bank on March 9, 1982. The subpoena is a trial subpoena for the United States District Court for the Northern District of Georgia for documents to be produced in connection with an action pending before the United States District Court for the Southern District of New York. While it commands the bank to produce certain records at 3:00 p.m. on March 12, 1982 in the United States District Court for the Northern District of Georgia, the subpoena does not refer to a judge or magistrate of this district before whom the subpoena is returnable. Moreover, with the exception of the instant petition, there are no proceedings in the action referred to in the subpoena currently pending before a court in this district.

The petitioner brings this petition in the form of a request for a writ pursuant to 28 U.S.C. §1651 seeking to quash the subpoena issued to the Trust Company Bank. Accordingly, the instant petition will be treated as a motion to quash pursuant to Rule 45 of the Federal Rules of Civil Procedure. As the subpoena duces tecum is directed to one other than the petitioner and the petitioner does not

claim any personal right or privilege with regard to the materials at issue, the petitioner lacks standing to contest the bank's amenability to compulsory process of this court. *Brown v. Braddick*, 595 F.2d 691, 697 (5th Cir. 1979). Accordingly, the instant petition is hereby overruled and denied. However, inasmuch as the instant subpoena duces tecum is a trial subpoena, *United States v. International Business Machines Corporation*, 71 F.R.D. 88 (S.D.N.Y. 1976), it is invalid due to the fact that it was issued by the clerk of this court for an action currently pending before the District Court for the Southern District of New York. Fed. R. Civ. P. 45(e). Accordingly, the court hereby quashes the subpoena duces tecum served on the Trust Company Bank, sua sponte.

SO ORDERED, this 16 day of March, 1982.

s/ G. Ernest Tidwell

G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX C—SUBPOENA AND AFFIDAVIT

CIVIL SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA

Murray Newman and Capitol Motors, Inc.

vs.

Murray M. Silver, Murray M. Silver, P.C. and Ralph Libutti, a/k/a Robert Presti

To Mr. Roy Gibson,
Mgr. of Summons
Trust Company Bank
250 Piedmont Road
Atlanta, Georgia

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Northern District of Georgia in the City of Atlanta, on the 12th day of March 1982 at 3:00 o'clock P.M. to bring with you the following records covering account numbers 03-54-85-2 (special count) and 01-83-96-2 (escrow account)

1. The Bank's copy of a check in the amount of $30,000.00 dated on or about August 4, 1978, drawn on the escrow account

2. The bank's copy of a check in the amount of $30,000.00 dated on or about August 11, 1978, drawn on the escrow account.

3. The bank's copy of a check in the amount of $12,500.00 dated on or about August 21, 1978, drawn on the escrow account.

4. The bank's copy of a check in the amount of $12,500.00 dated on or about August 24, 1978, drawn on the escrow account.

5. Documentation concerning a deposit into the escrow account of $27,860.00 on October 23, 1978 and a withdrawal of $28,000.00 on that same date.

March 9, 1982
s/ J. Robert Cooper
Attorney for Plaintiff
1401 Peachtree St. NE
Atlanta, Georgia 30309

BEN H. CARTER
by s/ Spencer D. Messa
Deputy Clerk.

AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURRAY NEWMAN and CAPITOLMOTORS INC.,
Plaintiffs,

-against-

MURRAY M. SILVER, MURRAY M. SILVER, P.C., and RALPH LIBUTTI, also known as ROBERT PRESTI,

Defendants.

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80 Civ. 1775 (RWS)

STATE OF NEW YORK)
COUNTY OF QUEENS) SS:

ROBERT A. KATZ, being duly sworn, deposes and says:

1. I am a member of LUBIN & KATZ, attorneys of record for the plaintiff in the within entitled action which is being tried before the Hon. Robert W. Sweet, Judge of the United States District Court of the Southern District of New York under docket No. 80 Civ. 1775 (RWS).

2. The next session of this non jury trial is scheduled for March 16, 1982 for the purpose of plaintiffs' continued direct examination of the co-defendant MURRAY M. SILVER.

3. During the course of the trial it was discovered that the defendant SILVER had deposited certain monies given to him by the plaintiff, CAPITOL MOTORS INC. in the following accounts at the Trust Company of the Bank of Atlanta, Georgia:

a) 03-54-85-2 (Special Account)
b) 01-83-96-2 (Escrow Account)

4. During the course of the trial is was represented by the defendant, MURRAY M. SILVER, that he could not locate his records for the year 1978.

5. Therefore, it now becomes necessary to seek to subpoena the records of The Trust Company of the Bank of Atlanta. More particularly, we seek the following:

a. The bank's copy of a check in the amount of $30,000.00 dated on or about August 4, 1978.
b. The bank's copy of a check in the amount of $30,000.00 dated on or about August 11, 1978.
c. The bank's copy of a check in the amount of $12,500.00 dated on or about August 21, 1978.
d. The bank's copy of a check in the amount of $12,500.00 dated on or about August 24, 1978.

6. Each of the checks described in paragraph 5 above are checks drawn on the escrow account of the defendant, MURRAY M. SILVER.

7. In addition plaintiff seeks documentation as to a deposit in the escrow account of $27,860.00 on October 23, 1978 and a withdrawal of $28,000.00 on that same date.

8. It is necessary to seek the aid of the District Court in Atlanta because in this diversity suit the Southern District of New York's jurisdiction does not encompass Atlanta, Georgia.

9. For the purposes of the ancillary aid herein sought, the plaintiffs have retained Cooper and Weintraub to bring proceedings in Atlanta, Georgia.

WHEREFORE, I request that the District Court in Atlanta, Georgia issue its subpoena for the records of The Trust Company of Atlanta, Georgia relating to the bank accounts of MURRAY M. SILVER upon the payment of proper fees.

Sworn to before me this
8th day of March, 1982
s/ Patricia R. Vanya
Notary Public
PATRICIA R. VANYA
Notary Public, State of New York
No. 41-450649, Qual. in Queens Co.
Certificate filed in New York County
Commission expires March 30, 1983

s/ Robert A. Katz
ROBERT A. KATZ

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF QUEENS) SS:

GERTRUDE BLOOM being duly sworn, says:

I am not a party to the action, am over 18 years of age and reside at Queens County, New York.

On March 8, 1982 I served a true copy of the annexed Affidavit in the following manner: by mailing same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

Daniel H. Greenberg, Esq.
122 E. 42nd Street
New York, N.Y. 10017

Woodcock & McClure, Esqs.
210 River Street
Hackensack, N.J. 07601
Att. Larry McClure, Esq.

APPENDIX D—AMENDED AND SUPPLEMENTAL COMPLAINT IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURRAY NEWMAN and CAPITOL MOTORS, INC.,
Plaintiffs,

-against-

MURRAY M. SILVER, MURRAY M. SILVER, P.C. and RALPH LIBUTTI, also known as ROBERT PRESTI,

Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs, by their attorneys, LUBIN & KATZ, complaining of defendants as described herein, respectfully show and allege:

DEFINITIONS

(a) The word "plaintiff" or "plaintiffs" wherever used in the following pleading is defined as plaintiff, MURRAY NEWMAN or plaintiff CAPITOL MOTORS, INC. of whom MURRAY NEWMAN was a principal and corporate officer and is used interchangeably throughout this pleading.

(b) The word "defendant" denotes MURRAY M. SILVER and MURRAY M. SILVER, P.C. except where it refers to defendant ROBERT PRESTI also known as RALPH LIBUTTI.

JURISDICTION

1. Jurisdiction in this action is predicated upon 28 U.S.C. 1332 upon the ground that there is diversity of-citizenship among the plaintiffs and the defendants and the amount in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive in interest and costs.

2. That plaintiffs plead that this Court also has jurisdiction over the person of the defendents and the subject matter of the action pursuant to CPLR 302 in that the alleged conduct and transactions of representing the plaintiff as an attorney in the case of the UNITED STATE OF AMERICA v. NEWMAN, et al took place in the County, City and State of New York. That all services material to that representation as attorney for the plaintiffs CAPITOL MOTORS, INC. and MURRAY NEWMAN, except for incidental matters such as out of state conferences, were rendered in the County, City and State of New York, including but not limited to the place where plaintiffs actually retained the defendant as their attorney. Further, that the acts or misrepresentation as including those described in paragraph 12 of this complaint occurred in the County, City and State of New York except certain acts occurring in Bronx County.

THE PARTIES

3. Plaintiff MURRAY NEWMAN is a citizen of the State of New York residing in Nassau County.

4. Plaintiff CAPITOL MOTORS, INC. is a domestic corporation formed under the laws of the State of New York and is a citizen thereof with its principal place of business in Bronx County

5. Defendant MURRAY M. SILVER is a citizen of the State of Georgia, residing in Atlanta, Georgia.

6. Upon information and belief, defendant MUR-

RAY M. SILVER, P.C. is a professional corporation formed under the laws of the State of Georgia, with its principal place of business in Atlanta, Georgia.

7. Upon information and belief, defendant ROBERT PRESTI also known as RALPH LI BUTTI is a citizen of the State of New Jersey.

CLAIM I BY PLAINTIFFS AGAINST MURRAY M. SILVER AND MURRAY M. SILVER, P.C.

8. At the times herein mentioned and upon information and belief, the defendant was an attorney duly admitted to practice law before various State and Federal Courts and had the legal capacity to act as an attorney for the plaintiffs in the United States District Court for the Southern District of New York in the case of UNITED STATES OF AMERICA v. NEWMAN, et al. under Docket No. 78CR 259. Included as defendant is MURRAY M. SILVER, P.C.

9. That during the period of the attorney-client relationship the plaintiff gave the defendant full trust and confidence and the defendant undertook to advise and counsel the plaintiff in all matters relating to the then pending case of UNITED STATES OF AMERICA v. NEWMAN, et al.

10. Upon information and belief, either prior to or at the time of retainer, the defendant knew that the plaintiff had elected to discharge the prior attorneys because plaintiff had lost confidence in the prior attorneys and plaintiff was insisting on taking the matter to trial.

11. That plaintiff only elected to retain the defendant and pay the defendant's fee upon the assurance that plaintiff would have a trial.

12. That plaintiff only elected to plead guilty after the defendant had told him that he, the defendant, when meeting with the prosecutor had seen a notation on the

prosecutor's file which he, the defendant, related to plaintiff as reading "10 years, $450,000.00 fine, extensive newspaper publicity.

13. That upon information and belief plaintiff now knows that defendant's representation was false. That the conduct heretofore described as to this defendant in representing the plaintiff is of the nature which is an affront and burden upon the processes of justice and is generally detrimental to the public at large and defendant should suffer punitive damages in the sum of Two Million ($2,000,000.00) Dollars.

14. That as a result of defendant's false representation, plaintiff gave up the valuable right of trial by jury and entered a plea of guilty to certain counts of the indictment.

15. By reason of the actions hereinbefore alleged, defendant breached his duty to the plaintiff and failed to properly represent plaintiff, all to the plaintiff's damage in the sum of Two Million ($2,000,000.00) Dollars. Plaintiffs also request an award of reasonable attorney's fees as may be fixed by the Court.

CLAIM II BY PLAINTIFFS AGAINST DEFENDANTS MURRAY M. SILVER AND MURRAY M. SILVER, P.C.

16. Plaintiff repeats and reiterates Paragraphs 1 through 15 inclusive as fully set forth herein.

17. That upon information and belief the defendant failed to accord plaintiff proper legal representation in that:

(a) Defendant failed to research the sections of the law under which the Court sentenced plaintiff.

(b) Defendant brought persons before the Court to speak for the plaintiff by letter and phone calls who were not part of the residential business or social

community of the plaintiff and who had no prior intercourse with the plaintiff.

18. That during the time the defendant acted as attorney for plaintiff defendant failed to exercise reasonable care and diligence in investigating the case, in researching the law, and in preparing for trial, in representing the plaintiffs at plea and sentence, as required of an attorney rendering proper and ethical representation in a criminal case.

19. That during the course of defendant's representing the plaintiff, the defendant plagiarized in whole or in part certain work which had already been done by the plaintiff's prior attorneys, which defendant adopted and represented as his own.

20. That the conduct heretofore described as to this defendant in representing the plaintiffs is of the nature which is an affront and burden upon the processes of justices and is generally detrimental to the public at large and defendant should suffer punitive damages in the sum of Two Million ($2,000,000.00) Dollars.

21. That at the time of the representations and negotiations hereinbefore referred to, the defendant knew that the plaintiff was not knowledgeable concerning the matters involved. That plaintiff had never, prior to this time, participated in a felony criminal proceeding and that plaintiff relied on defendant's professional skill, judgment, knowledge and integrity throughout the course of defendant's representation.

22. That by reason of the conduct hereinbefore alleged defendant breached his duty to the plaintiff and failed to accord proper representation as an attorney and counselor-at-law, all to plaintiffs' damage and plaintiffs seek damage both compensatory and general in the sum of Two Million ($2,000,000.00) Dollars, together with an award of reasonable attorney's fees as may be fixed by the Court.

CLAIM III BY PLAINTIFFS AGAINST DEFENDANTS PRESTI AND SILVER

23. Plaintiff repeats and reiterates Paragraphs 1 through 22 inclusive as if fully set forth herein.

24. Upon information and belief, the defendant RALPH LIBUTTI a/k/a ROBERT PRESTI (hereinafter referred to as "PRESTI") was a friend and acquaintance of the co-defendant SILVER prior to the time when PRESTI first met the plaintiff MURRAY NEWMAN in July, 1978.

25. That upon information and belief, the defendant PRESTI previous to July, 1978, had acted as a courier of cash monies and a solicitor of cases on behalf of the co-defendant MURRAY M. SILVER.

26. Upon information and belief, the co-defendant PRESTI, prior to the time that he spoke to the plaintiff MURRAY NEWMAN about retaining MURRAY M. SILVER, agreed with the co-defendant SILVER to solicit plaintiff MURRAY NEWMAN's pending case to the end that MURRAY NEWMAN would discharge his present counsel and retain MURRAY M. SILVER.

27. That as part of this solicitation, it was agreed between PRESTI and the co-defendant SILVER that the plaintiff MURRAY NEWMAN would be told by PRESTI that the co-defendant MURRAY M. SILVER had at PRESTI's request made inquiries to the Justice Department relating to the plaintiffs' criminal case and it was furthr agreed between the co-defendants that PRESTI would convince the plaintiff MURRAY NEWMAN that MURRAY M. SILVER had learned that Paul Parito, then the attorney for the plaintiff MURRAY NEWMAN, had mishandled the plaintiff's criminal case and that only this highly competent attorney, MURRAY M. SILVER, with friends in high places, could save the case.

28. That upon information and belief, the defendant

PRESTI knew that the statements which he was about to make to the plaintiff MURRAY NEWMAN in order to solicit the subject criminal case and induce MURRAY NEWMAN to retain MURRAY M. SILVER were in material parts false and untrue and that PRESTI then uttered them to the plaintiff MURRAY NEWMAN in reckless disregard of their truth or falsity.

29. That in furtherance of the wrongful solicitation and prior to plaintiff's retaining co-defendant SILVER, and prior to the plaintiff's payment of the retainer, the co-defendant PRESTI, having knowledge of the pendency of UNITED STATES OF AMERICA v. NEWMAN, et al. under Docket No. 78CR 259, approached the plaintiff MURRAY NEWMAN and others and made the following representations to the plaintiff MURRAY NEWMAN and others, to induce the hiring of SILVER:

(a) PRESTI told MURRAY NEWMAN that SILVER had made inquiries on the file and that Paul Parito who was then the attorney for MURRAY NEWMAN had built the case out of all proportions and that the case could be resolved easily by retaining MURRAY M. SILVER.

(b) PRESTI told MURRAY NEWMAN that SILVER was a highly competent attorney, knowledgeable in all respects of criminal law, and whose personal friends were the Honorable Jimmy Carter and the Honorable Griffin Bell.

(c) PRESTI told MURRAY NEWMAN that if SILVER takes your case, you have nothing to worry about.

30. In July, 1978, PRESTI had a telephone communication with the co-defendant MURRAY M. SILVER.

31. As a result of the aforedescribed communication, co-defendant SILVER flew to New York City to meet with the plaintiffs.

32. On or about July 28, 1978, a meeting took place in New York City, at which the following were present:

(a) PRESTI
(b) SILVER
(c) Phyllis Newman
(d) Gary Newman
(e) MURRAY NEWMAN.

33. As a result of that meeting and subsequent thereto, plaintiffs discharged their prior attorney and retained MURRAY M. SILVER to represent them in the criminal proceeding as previously described in Paragraph 8.

34. Co-defendant PRESTI was given cash by the plaintiff or plaintiffs agents or servants in the approximate sum of $200,000.00, part of which or all of which, upon information and belief, was delivered to the co-defendant SILVER in Atlanta, Georgia as part payment by plaintiffs of the legal fee to the co-defendant SILVER.

35. Subsequent thereto, defendant PRESTI was present at substantially all conferences with plaintiff held with the defendant SILVER in the State of New York, and posing as plaintiff NEWMAN's friend, assisted in SILVER's efforts to convince plaintiff to pleade guilty.

36. That upon information and belief, the aforedescribed agreement contemplated that defendant PRESTI would retain part of the legal fees.

37. Plaintiff now knows that the representations made relating to the fact that SILVER would try the criminal case of the plaintiff was substantially false and misleading and the conduct of PRESTI and SILVER, including the representations was fraudulent and deceitful in that SILVER never intended to do anything else but plead the plaintiffs guilty and that SILVER at no time intended to take the subject case to trial and never prepared for trial.

38. That as a result of the wrongful acts of the defendants, plaintiffs were forced to part with approximately $290,000.00, which plaintiff paid to defendants under false pretenses, all to the damage of the plaintiffs in the sum of approximately $290,000.00, plus expenses incurred by SILVER while attending plaintiffs in New York.

THE FOLLOWING PARAGRAPHS 39-48 STRICKEN BY COURT ORDER

39. That upon information and belief the wrongful conduct of defendant SILVER is not limited to the instant action but has been exhibited in defendant SILVER's relations with other legal clients.

40. That the scheme defendant SILVER has exhibited is to:

(a) Advise a criminal defendant who is presently representated by an attorney to discharge his attorney because that attorney was incompetent and not properly representing his client.

(b) That defendant SILVER then advised the criminal defendant that as defendant's new attorney he can guarantee a good result because he has influence with persons in the government, particularly the Justice Department.

(c) That defendant SILVER then tells the criminal defendant that he would do certain work in order to induce payment of the retainer.

41. That one Vincent Lynch was a criminal defendant convicted of racketeering in the Federal Court of Florida.

42. That during the trial and post trial period Vincent Lynch was represent by Alan Weinstein, Esq. That subsequent to the trial defendant SILVER sought out and actively solicited Vincent Lynch to become his client.

43. That the substance of this solicitation was to convince Lynch to discharge Alan Weinstein, Esq. because according to defendant SILVER, Alan Weinstein had failed to properly represent Vincent Lynch at trial.

44. That defendant SILVER also, in order to induce Vincent Lynch to retain defendant SILVER, told Vincent Lynch that Alan Weinstein would not file a brief for Vincent Lynch.

45. That defendant SILVER also, in order to induce Vincent Lynch to retain defendant SILVER, told Vincent Lynch he would make a motion for bail pending appeal.

46. That defendant SILVER was paid a retainer by Vincent Lynch of $2,500.00.

47. That defendant SILVER did not make the application for bail pending appeal.

48. That defendant SILVER only paid restitution of the retainer when Alan Weinstein, as attorney for Vincent Lynch, threatened legal action.

CLAIM IV BY PLAINTIFFS AGAINST DEFENDANTS PRESTI AND SILVER

49. Plaintiff repeats and reiterates paragraphs 1 through 48 inclusive as if fully set forth herein.

50. Plaintiffs, by their agents or servants delivered cash in the approximate sum of $200,000.00 to defendant PRESTI for the purpose of delivering same to the co-defendant MURRAY M. SILVER as part of his legal fee.

51. Upon information and belief, defendant PRESTI in the early weeks of August, 1978 made two trips to Atlanta, Georgia, to deliver the subject cash monies to defendant MURRAY M. SILVER.

52. On or about the 23rd day of July, 1980, the plaintiff, during the deposition of MURRAY M. SILVER, heard the defendant MURRAY M. SILVER testify that such monies were not delivered by PRESTI to MURRAY

M. SILVER and that such monies were not owed to MURRAY M. SILVER.

53. That the defendant PRESTI never accounted for the subject cash to the plaintiff.

54. In or about the first week of August, 1978, either defendant PRESTI or defendant MURRAY M. SILVER converted for his own use and benefit, or both defendants jointly converted for their own use and benefit, the subject cash monies, which monies remain the property of the plaintiffs.

WHEREFORE, plaintiffs demand judgment against defendants MURRAY M. SILVER, MURRAY M. SILVER, P.C., and ROBERT PRESTI as follows:

(A) On the first claim, plaintiff demands compensatory damages of $2,000,000.00 and punitive damages of an additional $2,000,000.00 including reasonable attorneys' fees, and this demand is made against defendant MURRAY M. SILVER and MURRAY M. SILVER, P.C. jointly and severally.

(B) On the second claim, plaintiff demands compensatory damages of $2,000,000.00 and punitive damages of an additional $2,000,000.00 including reasonable attorneys' fees, and this demand is made against defendant MURRAY M. SILVER and MURRAY M. SILVER, P.C. jointly and severally.

(C) On the third claim, plaintiffs demand compensatory damages of $2,000,000.00 and punitive damages of an additional $2,000,000.00 including reasonable attorneys' fees, and this demand is made against defendant MURRAY M. SILVER, MURRAY M. SILVER, P.C. and ROBERT PRESTI, jointly and severally.

(D) On the fourth claim, plaintiffs demand the return of the converted monies in the approximate sum of $200,000.00 and punitive damages of an additional $2,000,000.00 including reasonable attorneys' fees, and this demand is made against MURRAY M. SILVER,

MURRAY M. SILVER, P.C. and ROBERT PRESTI, seeking the recovery of converted monies.

(E) Costs and disbursements in this action, including an award for reasonable attorneys' fees.

s/ Lubin & Katz
LUBIN & KATZ
Attorneys for Plaintiffs
Office & Post Office Address
137-28 Northern Boulevard
Flushing, New York 11354
(212)FL 3-2250

[Verified by Murray Newman May 11, 1981]

AMENDED ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURRAY NEWMAN and CAPITOL MOTORS, INC.,
Plaintiffs,

-against-

MURRAY M. SILVER, MURRAY M. SILVER, P.C. and RALPH LiBUTTI, also known as ROBERT PRESTI,
Defendants.

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80 Civ. 1775 (RWS)

Defendant, Ralph LiButti, by his attorneys Moore,

Berson, Lifflander & Mewhinney, as and for his amended answer to the amended and supplemental complaint, alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 6 of the amended and supplemental complaint.

2. Denies each and every allegation contained in paragraph 7 of the amended and supplemental complaint, except alleges that defendant, Ralph LiButti, also known as Robert Presti, is a citizen of the State of New Jersey.

AS AND FOR AN ANSWER TO CLAIM 1

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 8 through 15 of the amended and supplemental complaint.

AS AND FOR AN ANSWER TO CLAIM 2

4. Repeats and realleges each and every admission and denial made in response to the allegations incorporated by reference in paragraph 16 of the amended and supplemental complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17 through 22 of the amended and supplemental complaint.

AS AND FOR AN ANSWER TO CLAIM 3

6. Repeats and realleges each and every admission and denial made in response to the allegations incorporated by reference in paragraph 23 of the amended and supplemental complaint.

7. Denies each and every allegation contained in paragraph 24 of the amended and supplemental complaint, except alleges that defendant, Ralph LiButti, had met Murray Silver prior to July, 1978.

8. Denies each and every allegation contained in paragraphs 25 through 29 of the amended and supplemental complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 30 and 31 of the amended and supplemental complaint.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the amended and supplemental complaint.

11. Denies each and every allegation contained in paragraphs 34 through 38 of the amended and supplemental complaint.

12. Makes no response to paragraphs 39 through 48 of the amended and supplemental complaint, which paragraphs were stricken by court order.

AS AND FOR AN ANSWER TO CLAIM 4

13. Repeats and realleges each and every admission and denial made in response to the allegations incorporated by reference in paragraph 49 of the amended and supplemental complaint.

14. Denies each and every allegation contained in paragraph 50 of the amended and supplemental complaint.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 52 of the amended and supplemental complaint.

16. Denies each and every allegation contained in paragraph 53 of the amended and supplemental complaint, except alleges that no accounting was ever demanded of him.

17. Denies each and every allegation contained in paragraph 54 of the amended and supplemental complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein with respect to defendant, Murray M. Silver.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

18. The Court lacks jurisdiction over the person of this defendant.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

19. Insufficiency of service of process upon this defendant.

WHEREFORE, defendant, Ralph LiButti, demands judgment dismissing the amended and supplemental complaint, together with costs and disbursements of this action.

MOORE, BERSON, LIFFLANDER
& MEWHINNEY
By s/ Michael Sullivan
A Member of the Firm
Attorneys for Defendant
Ralph LiButti
555 Madison Avenue
New York, N.Y. 10022
(212) 838-0600

ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURRAY NEWMAN and CAPITOL MOTORS, INC.,
Plaintiffs,

v.

MURRAY M. SILVER, MURRAY M. SILVER, P.C., and RALPH LIBUTTI, also known as ROBERT PRESTI,
Defendants.

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80 Civ. 1775 (RWS)

Defendants Murray M. Silver and Murray M. Silver, P.C., by Daniel H. Greenberg, their attorney, for their answer to the amended and supplemental complaint, allege:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "1", "2", "3", "4", "7", "28", "29", "29(a)", "29(b)", "29(c)", "30", "33" and "53" of the amended and supplemental complaint.

2. Admit the allegations of paragraphs "5" and "6" of the amended and supplemental complaint.

3. Admit so much of the allegations of paragraph "8" of the amended and supplemental complaint as purports to refer to defendant Murray M. Silver, where the allegations states "the defendant", and as to defendant Murray M. Silver, admit that at all times relevant to this action defendant Murray M. Silver, was and is an attorney

at law duly admitted to practice law in the State of Georgia and duly admitted to practice law in various federal courts in the State of Georgia and elsewhere, including the United States District Court for the Southern District of New York, but deny each and every allegation of said paragraph "8" as relates to defendant Murray M. Silver, P.C.

4. Deny each and every allegation of paragraphs "9", "10", "11", "12", "13", "14", "15", "17", "18", "19", "20", "21", "22", "25", "26", "27", "35", "36", "37", "38", "50", "51" and "54" of the amended and supplemental complaint.

5. Deny each and every allegation of paragraph "31" of the amended and supplemental complaint, except admit so much thereof as alleges that on or about July 28, 1978, defendant Murray M. Silver travelled to New York, New York from Atlanta, Georgia.

6. Admit so much of allegations of paragraph "32" of the amended and supplemental complaint as purports to allege that the persons named therein were present together on the alleged occasion, and deny each and every other allegation of said paragraph "32".

7. Deny each and every allegation of paragraph "34" of the amended and supplemental complaint, except deny knowledge or information sufficient to form a belief as to the truth of so much of the allegations thereof as purport to allege that defendant Ralph LiButti, referred to therein as "Robert Presti", was "given cash by the plaintiff or plaintiff's agents or servants in the approximate sum of $200,000.00."

8. With respect to the allegations of paragraphs "39", "40", "41", "42", "43", "44", "45", "46", "47" and "48" of the amended and supplemental complaint, since these allegations have been ordered stricken by the court, there will be no responsive pleading thereto.

9. Deny each and every allegation of paragraph "52" of the amended and supplemental complaint, and for the full, true and correct testimony of defendant Murray M. Silver at his oral pre-trial deposition conducted in this action, refer to the transcript thereof.

WHEREFORE, defendants Murray M. Silver and Murray M. Silver, P.C., demand judgment dismissing the complaint, together with the costs and disbursements of this action.

s/ Daniel H. Greenberg
DANIEL H. GREENBERG
Attorney for Defendants
Murray M. Silver and Murray
M. Silver, P.C.
122 East 42nd Street
New York, New York 10168
(212) 697-0133

APPENDIX E—LETTER DATED JANUARY 11, 1982

[Letterhead of Lubin & Katz, 137-28 Northern Blvd., Flushing, N.Y. 11354 (212) FL 3-2250]

January 11, 1982

Daniel Greenberg, Esq.
122 East 42nd Street
New York, New York 10017

Re: *Newman v. Silver et al 80 Civ. 1775 (RWS)*

Dear Mr. Greenberg:

This letter will confirm our telephonic conversation of the morning of January 8, 1982 wherein you agreed to have the defendant Murray M. Silver produce at the trial the following:

1—Bank statements on Account (03-54-89-2).
2—Cancelled checks on Account (03-54-85-2) covering July and August 1978.
3—Bank statements on Escrow Account (01-83-93-2).
4—Cancelled checks on Escrow Account (01-83-96-2) covering July and August 1978.

This will further confirm that you raised with me the problem of attorney-client privilege as to escrow funds of other clients.

Please accept this letter in lieuof a more formal notice to produce.

Very truly yours,

LUBIN & KATZ

by s/ Robert A. Katz
ROBERT A. KATZ

RAK:js

APPENDIX F—TRANSCRIPT PAGE 491

Judge Sweet (in robing room): This is to be deemed a subpoena Mr. Greenberg; anything that he has. He now does testify he has FBI notes. Anything he has relating to this case should be produced.

(Tr. p. 491) (January 14, 1982) (A copy of which to be provided).

APPENDIX G—PETITION FOR WRIT OF MANDAMUS

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MURRAY NEWMAN AND CAPITOL MOTORS, INC.,

Petitioners,

v.

HONORABLE G. ERNEST TIDWELL, JUDGE FOR THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF GEORGIA,

Respondent.

PETITION FOR WRIT OF MANDAMUS

Petitioners, MURRAY NEWMAN AND CAPITOL MOTORS, INC., through undersigned counsel, respectfully petition this Court to issue a Writ of Mandamus pursuant to Rule 21(a) of the Federal Rules of Appellate Procedure, as derived from 28 USC 1651, directed to the Honorable G. Ernest Tidwell, Judge of the United States District Court of the Northern District of Georgia, the Respondent, and in support of this application petitioners state:

I. ORDER BELOW

On March 16, 1982, Respondent entered an order *sua sponte,* quashing a *subpoena duces tecum* issued by Petitioner to Trust Company Bank, Atlanta, Georgia, a non-party in an action pending in the United States District Court for the Southern District of New York. A copy of

the order issued by Judge Tidwell is attached hereto as Exhibit A and incorporated herein by reference.

II. STATEMENT OF FACTS

On or around March of 1980, a civil action raising claims of legal malpractice against Murray M. Silver, Esq., the Defendant herein, was filed in the Supreme Court of the State of New York (Bronx County). The case was subsequently removed from State to Federal Court pursuant to 28 USC 1441.

On July 24, 1980, during the course of pre-trial discovery Attorneys for Petitioner in the New York action, requested copies of all records and documents in Defendant Silver's possession relating to *inter alia*, certain account with the Trust Company Bank of Atlanta, Georgia. From the outset Mr. Silver was extremely uncooperative and evasive. In response to repeated requests by Attorneys for Petitioner in the New York action, Mr. Silver eventually related the unfortunate, but fortuitous, spilling of coffee over the file containing many of the requested documents rendering them unsalvageable. This incident was disclosed during a deposition taken of Mr. Silver, in which he testified:

> Q. Do you have with you the file for the case of United States of America against Murray Newman Capitol Motors—
>
> *******
>
> Q. Can you show us the results of whatever legal research you or your associates did on behalf of the Plaintiffs?
>
> A. Counsel, as I told Mr. Katz yesterday, I had, roughly speaking, oh, God, I guess, a hundred 50 to a hundred 60 pages, together with some other records in this case.
>
> Two weeks ago, unbeknowing to me, the secretary that was working there part-time spilled a container with coffee, cream and sugar on the files and I didn't know it was done until several days had passed.

When I got them, they were just—it was just absolutely impossible for me to even separate them. They all stuck together.

Q. Mr. Greenberg: Do you still have the papers?

A. The Witness: No we had to throw them away because they attracted ants and roaches.

Tr. p. 74. Deposition of Murray Silver, July 24, 1980) (Exhibit B attached hereto).

Subsequently, Attorneys for Petitioner began narrowing their requests for documents that were not "destroyed" by the unfortunate incident, focusing primarily on the bank records and checks.

In the weeks preceding the commencement of the trial on January 13, 1982, negotiations between Petitioner's New York Attorneys and Mr. Greenberg, Mr. Silver's Attorney, led to an agreement with Mr. Greenberg to provide the requested documents and checks without further resort to formal judicial process. This agreement was memorialized in a letter from Petitioner's Attorney dated January 8, 1982, (Exhibit C a copy of which will be provided to the Court). Despite the agreement, Mr. Greenberg denied its existence, necessitating the issuance of a subpoena to Mr. Silver for all requested documents by the New York Court (Exhibit D, attached hereto). Seemingly, angered Mr. Silver's lack of responsiveness, the trial judge also subsequently issued a subpoena to Mr. Silver requesting all documents relating to the case. *See,* Trial Tr. 491 (1/14/82), attached as Exhibit D-1)

Although certain bank statements were ultimately produced, another unfortunate, but fortuitous, accurence prevented the production of the requested checks. According to Mr. Silver, his accountants were given all bank records, including the checks, and for some unexplained reason could not find them. As recounted by Mr. Silver during trial:

Q. Can you tell us why you could not produce the originals of the records here?
A. The originals of what records?
Q. Of the bank records.
A. Of the bank records that you subpoenaed?
Q. The bank records, July through October 1978.
A. Sir, as we stated before, as I stated before, I was audited by the Internal Revenue Service. As I recall it, once again, I'm not going to be absolutely certain, but as I recall it, it was during the year 1980. All my records were referred to my accountants. And they handled the audit. I'm about the world's worst bookkeeper and mathematician. And they handled my bank account completely, even to the point that they balanced my checkbook.
Q. It is your recollection—
Mr. Greenberg: Has he finished his answer?
The Court: Have you finished, Mr. Silver?
Q. Do you wish to continue, Mr. Silver?
A. I think I've finished, sir.
Q. Can you tell us what that has to do with your not having produced the original of the records?
A. Well, as I indicated to you before, when I received the subpoena before, I went back to Atlanta, Georgia to obtain the records in compliance with the subpoena. When I got there, as I recall, you only gave me a day or two to do this. And I was in New York when you gave me the subpoena. And so I had to go back to Atlanta at my expense and search my office for those particular bank statements that you have reference to I think I indicated to you at that time that I had just moved from my offices in Colony Square to my new office in the Life of Georgia Tower in Atlanta. I searched the facility that was available to me to see if I could come up with the statements. I could not find them. I called my accountants. They indicated to me that they would search for them. They said that they could not find them.

Now, they have moved since all of this took place. So when I could not come up with the original records, then I called the trust company back and asked them could they

get the records for me. And that's how I got them and that's what we delivered to the Court.
Q. Did you make an effort to obtain these records from your accountants?
A. Yes, I said that, Mr. Lebron.
Q. What did they say, if anything?
A. Their statement to me, sir, I've just stated that, sir, that they searched their facilities and they could not find that which I referred to them.
Q. In short, was it their contention that these records had been lost?
A. No, sir. They did not say that at all.

(See Tr. p. 37-39. Testimony of Murray Silver, March 17, 1982) (Exhibit E, attached hereto).

Mr. Silver did, however, manage to obtain duplicate bank statements from Trust Company Bank, but for some reason, did not bother to obtain copies of the checks.

Soon thereafter, the undersigned counsel was retained to subpoena the checks directly from Trust Company Bank. A subpoena *duces tecum* was issued to the bank returnable to the office of the Clerk for the United States District Court for the Northern District of Georgia. (Exhibit F, attached hereto). Although the bank was ready, willing and able to comply with the subpoena, Mr. Silver objected and filed a motion to quash. Judge Tidwell dismissed Mr. Silver's petition for lack of standing, but then quashed the subpoena *sua sponte* under the erroneous presumption that it was a trial subpoena, and thus, beyond the jurisdiction of this Court.

III. ISSUE PRESENTED

The sole issue presented to this Court is whether Respondent abused his discretion in quashing petitioner's *subpoena duces tecum* without complete knowledge of the total facts and circumstances surrounding its issuance.

IV. REASONS WHY WRIT SHOULD ISSUE

It is well settled that a writ of mandamus is appropriately issued when there is a clear abuse of discretion on the part of the Judge. *Schlagenauf v. Holder,* 379 US 104, 109-10 (1964); *Bankers Life and Casualty Co. v. Holland,* 346 US 379, 383 ( ). Generally "[a] Judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision." *Premium Service Corp. v. Sperry & Hutchinson Co.,* 511 F.2d 225 (9th Cir. 1975) Respondent herein is guilty of both infirmities above mentioned, and has clearly abused his discretion.

Although Respondent dismissed Mr. Silver's petition to quash he, nevertheless, relied on Mr. Silver's contention that the subpoena was a trial subpoena under Rule 45(e) of the Federal Rules. But, Respondent was never made aware of the facts surrounding the issuance of the subpoena. The documents sought therein were originally requested from Mr. Silver over one year prior to trial. It was only due to Mr. Silver's evasiveness and imagination in conjuring up convaluted stories concerning the disappearance of all documents crucial to petitioners case, that the documents were not procured prior to the time the trial began. Petitioner acted in good faith in trying to obtain the requestd checks and only after trial began did Mr. Silver make it absolutely clear that he had absolutely no intention of providing the sought after checks.

Rule 45(d) of the Federal Rules of Civil Procedure authorizes Federal Courts outside the jurisdiction of the situs of a cause of action to issue subpoenas to aid in discovery and to obtain depositions. Rule 45(d)(1) expressly provides that such a subpoena "may command a person to whom it is directed to produce and permit inspection and copying of . . . documents. . . ." While ordinarily such a request for documents under Rule 45(d)(1) is issued

in conjunction with the taking of a deposition, the Supreme Court has recognized that an *ad testificandum* clause is not necessary in a subpoena to compel the production of documents. *Wilson v. United States,* 221 US 361, 372, (1911); *Essgee Co. of China v. United States,* 262 US 151 (1923). *See also, 5 A.J. Moore, Federal Practice,* 45-78 (2nd ed. 1975). Petitioner sought the assistance of the District Court for the Northern District of Georgia pursuant to its Rule 45(d) power, and relying on Supreme Court precedent omitted the *ad testificandum* clause.

Respondent, however, ruled the subpoena invalid under Rule 45(e). That rule applies to the issuance of subpoenas for trial. Respondent cites the case of *United States v. International Business Machines, Corp.,* 71 FRD 88 (S.D.NY. 1978) in support of this conclusion. That case did in fact involve a trial subpoena issued by the wrong Court to obtain document from a prospective witness to be used against that very same witness during examination. The party issuing the subpoena admitted to that fact. In the present petition, however, the documents are not being sought from a prospective witness, neither Trust Company Bank nor any of its officers were called as witnesses nor were intended to be called. Further, the *I.B.M.* case clearly mistakes the law: "[Rule 45(d)] addresses subpoenas *duces tecum* in connection with depositions and neither authorizes nor addresses subpoenas *duces tecum* which are unconnected to a deposition proceeding. . . .". In support the *I.B.M.* Court cites to 5a*J.Moore, Federal Practice* 45-78 (2d.ed. 1975), but on that very page Professor Moore recognizes that "the better authority indicates that oral testimony need not actually be taken." *Id.* See, *Wilson v. United States,* 221 US at 372.

Respondent bases his conclusion on no other authority. Clearly, had petitioner sought to compel the deposition

of an officer of the bank, and included a request for documents, all to be used at trial, Rule 45(d) authorizes an auxilliary Court to open its doors and issue a subpoena for that purpose. The mere fact that Petitioner omitted the *ad testificandum* clause, especially in light of Supreme Court precedent, should not arbitrarily close the doors by attaching a different label.

Therefore, it is apparent that respondent abused his discretion in that there was no evidence upon which to base his decision and that he applied an erroneous conclusion of law.

WHEREFORE, Petitioner respectfully requests that a writ of mandamus issue directing the Respondent, and requiring him to compel the production of those documents requested from Trust Company Bank of Atlanta, Georgia, in the subpoena *duces tecum* issued March 9, 1982.

Respectfully submitted,
s/ J. Robert Cooper
J. Robert Cooper, Esq.,
Attorney for Petitioner

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